

MAR 05 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MATTHEW MCCALL, JR.,

Defendant - Appellant.

No. 07-10151

D.C. No. CR-05-00190-GEB

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, Chief District Judge, Presiding

Argued and Submitted February 11, 2008
San Francisco, California

Before: D.W. NELSON, KLEINFELD, and HAWKINS, Circuit Judges.

Matthew McCall appeals the district court's order denying his motion to suppress a loaded gun found in his back pocket. McCall asserts that the search violated his Fourth Amendment Rights. We disagree.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

The arresting officer had reasonable suspicion to frisk McCall for weapons because “a police officer who reasonably believes that a suspect could be armed and presently dangerous may frisk the suspect to determine whether the person is carrying a weapon.”¹ McCall waived his right to appeal the issue that his investigative detention turned into a custodial arrest when he was handcuffed because he did not raise that issue before the district court so we need not reach the question.² The officer had reasonable suspicion, and the furtive movement in the car, the risk that McCall had a sharpened screwdriver to use for car burglaries, the hour, and the darkness of the location gave the officer reasonable concern for his own safety.

Alternatively, the frisk that turned up the gun was a legitimate search incident to arrest, assuming the handcuffs made this an arrest. The driver’s statement that “we” were smoking marijuana, combined with the odor of marijuana smoke, the observation that the car emitting marijuana smoke had been moving, and that it was McCall who made the furtive movement (which could indicate that

¹ United States v. Hartz, 458 F.3d 1011, 1018, (9th Cir. 2006) (internal citations and quotations omitted).

² See United States v. Flores-Montano, 424 F.3d 1044, 1047 (9th Cir. 2005).

he was hiding or retrieving a weapon or hiding a stash) gave the police officer probable cause for arrest for possession of marijuana³ and for transporting marijuana.⁴ Although California law requires release after an arrest for violation of the statute prohibiting possession of not more than 28.5 grams of marijuana after presenting satisfactory identification, by its terms, “in which a person is arrested for a violation of this subdivision,” the statute contemplates that arrest for violation of the subdivision is permissible. In any event, the officer was not obligated to accept as true what the driver claimed, that the amount of marijuana in the car was merely a “roach.” The police officer therefore lawfully arrested McCall and conducted a proper search incident thereto.

AFFIRMED.

³ Cal. Health & Safety Code § 11357.

⁴ Cal. Health & Safety Code § 11360.